SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1029

KENNECOTT COPPER CORPORATION, *Petitioner,*

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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April 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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ARGUMENT

In its petition for a writ of certiorari, Kennecott Copper Corporation showed that the decision of the court below is in conflict with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and that it decided an important issue of Federal law that should be finally resolved by this Court. The brief in opposition filed on behalf of the respondent Administrator of the Environmental Pro-

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tection Agency makes no substantial effort either to address this conflict in decisions or to dispute the importance of this case. In short, the brief in opposition only confirms that the issuance of a writ of certiorari by this Court is amply warranted.

1. In *Train* v. *NRDC*, *supra*, this Court declared that, so long as a State's implementation plan makes provision for attaining and maintaining national ambient air quality standards, EPA has no authority under the Clean Air Act to challenge the particular control strategy adopted by the State. The court below, however, held that EPA may indeed disapprove a State plan, even though it provides for meeting the national standards, if it does so by reliance on control strategies other than the one preferred by EPA. Perhaps the most remarkable thing about EPA's brief in opposition is its almost total failure to come to grips with this irreconcilable conflict between the Ninth Circuit's decision and the definitive ruling so recently handed down by this Court.

About all EPA has to say about this Court's decision in *Train* v. *NRDC* is to argue that the Court's description of "emission limitations" therein clearly excluded supplementary-control and tall-stack techniques (Br. Opp. 7-8). To begin with, it is difficult to imagine that this Court would have announced such a constricted definition of "emission limitations" at the same time it was affirming the States' freedom to adopt whatever control strategies are best suited to their local needs. Furthermore, as we pointed out in the petition, the cited passage in the Court's opinion in fact contradicts EPA's narrow view (Pet. 9). Far from containing the kind of restrictive qualifications for which EPA contends, the only requirement it imposes on emission

limitations is that they "result in ambient air which meets the national standards" (421 U.S. at 78).

EPA's thesis seems to be that, in describing emission limitations as "regulations of the composition of substances emitted" (*ibid.*), this Court cannot have intended to include "regulations that merely regulate the time * * * or the altitude" at which pollutants are released (Br. Opp. 8). That hardly describes the Nevada plan, in which supplementary controls and a tall stack are integral parts of an overall control strategy that provides for a continuous reduction in sulfur emissions of *at least 60 percent* (see Br. Opp. 3). Thus, not only does the Nevada plan contain "emission limitations" as defined by this Court, but it also would effect the "constant emission reductions" required by EPA's preferred strategy. The Ninth Circuit's contrary holding represents an unacceptable interference with the States' exercise of their assigned responsibilities under the Act.[1]

2. EPA next argues that supplementary control systems should not be considered "emission limitations" within the meaning of the Clean Air Act because they "do not provide a sufficient guarantee that national primary and secondary ambient air quality standards will be maintained" (Br. Opp. 9). This contention, of course, belies EPA's insistence that, in resisting the use of such control techniques, it is not primarily concerned

[1] EPA's attempt (Br. Opp. 8 n. 4) to explain away this Court's disapproval of "forcing further technological developments" where "national standards are being attained and maintained" (421 U.S. at 91) is unpersuasive. The gloss that EPA would apply to the Court's words would render them virtually meaningless—a consummation devoutly to be wished by EPA but scarcely in accord with the will of Congress.

with administrative convenience and ease of enforcement (see Br. Opp. 6 n. 2). It must also be observed that this type of argument "goes more to the wisdom of what Congress has chosen to do than to determining what Congress has done," *Train* v. *NRDC, supra,* 421 U.S. at 92.

What is more to the point, however, is the fact that EPA itself has repeatedly confirmed the reliability of supplementary control systems. An EPA Staff Paper relied on by the court below (Pet. App. 12a n. 24) states that "an ICS [intermittent or supplementary control system], when properly designed and diligently and conscientiously operated, can be used to attain air quality standards with the same reliability as a CCS [constant control system]," 119 Cong. Rec. 19189, 19190-91 (1973). Similarly, EPA has publicly declared that "such [supplementary control] systems can be designed and operated in such a way as to be a reliable means of attaining and maintaining national standards in selected situations," 38 Fed. Reg. 25697, 25700 (1973).

Thus, the worst that can be said of a supplementary control system is that—like any technologically advanced system—its reliability depends on how well it is designed and how conscientiously it is operated. This means that EPA and the States must frame regulatory guidelines and devise enforcement techniques to insure that only properly designed systems are installed and that they are efficiently operated and carefully maintained. That EPA may find this administrative responsibility inconvenient or perhaps even onerous is no reason for the agency or the courts to rewrite the Act.

The foregoing comments apply equally to EPA's argument that "dispersion techniques" (the non-statu-

tory label EPA has affixed to supplementary-control and tall-stack techniques) are inconsistent with "the policy of nondegradation in the Clean Air Act" (Br. Opp. 10). In the first place, the factual premises on which this argument is based are false; for example, the EPA Staff Paper cited above conceded that, because a pollutant that is being dispersed is also being diluted, "the assumption that *total environmental damage decreases with increased pollutant dispersion* is reasonable," 119 Cong. Rec. at 19193 (emphasis supplied). Furthermore, to the extent that the Clean Air Act embodies a "policy of nondegradation," EPA and the States have ample means of enforcing it against all sources, regardless of the control techniques they are employing.[2]

3. EPA goes on to claim that "the legislative history of subsequent amendments to the Clean Air Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available" (Br. Opp. 10-11). That EPA must place such reliance on "subsequent legislative history" only underscores the fact that nothing in either the language or the legislative history of the provision involved in *this* case (Section 110(a)(2)(B) of the Act) supports EPA's position. Moreover, this Court has repeatedly cautioned that the meaning of a statute cannot be altered by subsequent statements of legislators and agency officials or by such ambiguous

[2] In fact, EPA has already promulgated comprehensive "nondegradation" regulations, 39 Fed. Reg. 42510 (1974), the validity of which is being litigated in *Sierra Club* v. *EPA* (D.C. Cir. Nos. 74-2063, *et al.*). Among the issues involved in that litigation is whether Congress did indeed write the so-called "nondegradation policy" into the Act, a question on which this Court (having divided evenly when the issue was last before it) has not yet ruled.

actions as the failure to adopt proposed amendments, see, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Particularly wide of the mark is EPA's argument that the 1974 amendment to the Clean Air Act added by the Energy Supply and Environmental Coordination Act supports the agency's interpretation of Section 110 (a)(2)(B) (Br. Opp. 12-13). As EPA correctly states, the 1974 amendment was adopted to provide relief from pollution control requirements for certain large emission sources that switch from oil or gas to coal because of the fuel shortage. Under its terms, EPA may allow such sources to employ supplementary control systems for a limited period, subject to certain restrictive conditions. EPA views the narrowness of those conditions as evidence that Congress disapproves of the use of supplementary control systems.

This argument totally misconceives the thrust of the 1974 amendment. The cited provision permits EPA to *force* supplementary control systems on any State in which an affected source is located, regardless of whether the State wishes to use such systems as part of its control strategy. Since the grant of such a preemptive power to EPA is so at odds with the basic policy of the Act, Congress naturally placed stringent conditions on its use. It did so, not to curtail the State's choices of control strategies, but to restrict EPA's power to *override* those choices. Thus, far from reflecting legislative rejection of a particular control technique, the 1974 amendment represents a clear reaffirmation by Congress that it is the *States* that are

to select the means for controlling pollution in each local area, not EPA.

4. Finally, EPA points to several proposed amendments to the Clean Air Act now pending in Congress, suggesting that they support EPA's position on the merits and that their adoption might rob this case of any prospective importance (Br. Opp. 13-14 n. 10). Neither of these contentions is meritorious, for the provisions to which EPA refers have no direct bearing on the present case. The provisions in the House bill cited by EPA, like the 1974 amendment just discussed, would merely authorize temporary relief from State-imposed emission controls; they would not enlarge or diminish the States' discretion to decide what controls to impose in the first place, which is what this case is concerned with.

The cited provisions of the Senate bill would somewhat amplify the statutory requirements governing State implementation plans, but the issue posed here—whether the Administrator may disapprove a State plan because he disagrees with the means selected by the State for *meeting* those statutory requirements—would remain unaffected by their enactment. Thus, while the Senate bill specifically sanctions State adoption of supplementary-control strategies for existing copper smelters, its enactment would not, so far as we are aware, alter EPA's position that it is free to impose time limitations and technology-forcing conditions on the use of such strategies, as it did here. Indeed, if the proposed amendments have any significance at all for present purposes, it is that they emphasize the continuing need for this Court to confine EPA to its proper role under the Act. That, of course, *is* what this case is about.

CONCLUSION

The brief in opposition filed on behalf of EPA has in no way reconciled the sharp conflict between the decision below and this Court's authoritative opinion in *Train* v. *NRDC*. Nor has it challenged the broad importance of the issues decided by the court below. Accordingly, for the reasons stated in the petition and this memorandum, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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